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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-336

CALIFORNIA STATE BOARD OF PHARMACY, et al.,
Appellants,

vs.

SHIRLEY TERRY, individually and on behalf of all others similarly situated, Plaintiff, and ELLEN STERN HARRIS, et al.,
Plaintiffs in Intervention,
Appellees.

Appeal from the United States District Court
for the Northern District of California

Motion to Affirm

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Appellees, pursuant to Rule 16(1)(c) and (d) of the Rules of the Supreme Court of the United States, move that the final judgment and order of the District Court be affirmed on the ground that the decision of the District Court is so obviously correct under the principles established by this Court in *Bigelow v. Commonwealth of Virginia,* ..... U.S. ....., 95 S.Ct. 2222 (1975) as to warrant no further review by this Court.

OPINION BELOW

The opinion of the District Court is reported at 395 F. Supp. 94, and is set forth, together with the Court's judgment, in Appendices A and B of Appellants' Jurisdictional Statement.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Appellants' Jurisdictional Statement.

QUESTION PRESENTED

Does a statutory scheme, which makes it unlawful to advertise the price of prescription drugs or the fact that prescription drugs are being sold at a discount and which the court below found only minimally advanced any state interest and which failed to advance those interests by the least burdensome means, violate Appellees' First Amendment right to receive health-vital information.*

STATEMENT OF THE CASE

Appellees disagree with Appellants' statement of the case in the following particulars:

Appellants' claim on page 8 that ". . . the lower court was not called upon to resolve any factual issues" is incorrect. Although some background facts were settled by a stipulation of the parties dated December 11, 1974 (CT 119-25), the remainder of the factual issues were presented to the court for final decision upon the affidavits and exhibits submitted. In fact, a stipulation was filed by the

*The instant case also raises a number of questions which Appellees believe are not necessary for consideration on a motion to affirm in light of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, No. 74-895, *prob. juris noted*, ... U.S. ....., 95 S.Ct. 1389 (March 17, 1975). For example, Appellees have alleged that the statutory scheme is void under the Supremacy Clause because it conflicts with the antitrust laws of the United States, that the statutes in question are unconstitutionally vague and that they abridge Appellees' right to publish health-vital information.

parties on January 8, 1975 (CT 397) agreeing that the court could, without objection as to form, consider all of the affidavits and exhibits in arriving at its decision on the merits. As seen in the opinion below, the lower court did undertake this resolution of the many disputed factual issues. See *e.g.*, 395 F.Supp. at 104, 105.

Appellants' similar claim on pages 8 and 9 of their Jurisdictional Statement, that the lower court "failed to appreciate" certain of their assertions is also incorrect. The District Court's opinion clearly demonstrates that all of these allegations were carefully considered, but were rejected on the facts presented. As will be discussed more fully below, Appellants appear to equate the lower court's unfavorable decision on the facts with a supposed failure to consider these facts.

STATUTES INVOLVED

The applicable provisions of the California Business and Professions Code are set forth in Appellants' Jurisdictional Statement at pp. 3-7. All references herein are to said Code unless otherwise noted.

ARGUMENT

Last Term this Court, in *Bigelow v. Commonwealth of Virginia*, ... U.S. ....., 95 S.Ct. 2222 (1975), laid to rest any lingering doubts that "commercial speech," such as advertising, might be totally outside the ambit of First Amendment protection. Putting an end to the rigid "commercial" versus "non-commercial" legacy of *Valentine v. Chrestensen*, 316 U.S. 52 (1942), this Court concluded:

> "The fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the ad-

> vertisement involved sales or 'solicitations,' [citations omitted] . . . or because appellant's motive or the motive of the advertiser may have involved financial gain [citations omitted]." 95 S.Ct. at 2231.

Bigelow teaches that the task of courts, when confronted with First Amendment issues arising in a commercial context, is to carefully balance the First Amendment interests asserted against the regulatory interests advanced by the state. 95 S.Ct. at 2234-2235.

This is exactly what the lower court in the present case did. It weighed the importance of competitive prescription drug price advertising (with its resultant lower prices and greater availability of information to the consuming public) against the alleged evils sought to be avoided by the statutory ban. As will be discussed, its decision was correct on the record and requires no full review by this Court.

The opinion below, although penned slightly before the *Bigelow* decision, analyzed the evidence under both the "commercial versus non-commercial" test, and under the "balance of interests" approach found in *Bigelow*. Under the former test, the court concluded that the speech was not commercial within the meaning of *Valentine*. 395 F.Supp. at 98-102. Under the latter approach, the court concluded that the dissemination of prescription drug price information through advertising was of great benefit to Appellees and that the alleged harm resulting from such advertisements was, at best, unconvincing and unproven. 395 F.Supp. at 102-106.

First, there is little question from the record that the information sought by Appellees is vital, and sometimes life-essential, to the consuming public,[1] and that the retail

1. Stipulation of Facts filed December 11, 1974 (CT 121, 125) at ¶¶ 1, 17.

price for such required drugs necessarily must come down in a competitive market.[2]

Secondly, the fact that prescription drug price information is obtainable from pharmacies via a visit or telephone call, does not diminish the Appellees' right to receive this information in the manner desired. *Schneider v. Irvington*, 308 U.S. 147, 163 (1939); *accord, Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Pell v. Procunier*, 417 U.S. 817 (1974). Even if this availability of other sources of information were constitutionally relevant, the lower court specifically found from the evidence presented, that these other sources are more burdensome and less effective than information conveyed through the advertising medium. 395 F.Supp. at 104.

Thirdly, and most importantly, there is dearth of evidence to support Appellants' claims, made at length in their Jurisdictional Statement, regarding "artificial demand" and other evils which allegedly result from price advertising. All three judges below, upon examination of the evidence in full, found little or no support for any of Appellants' claims in this regard. 395 F.Supp. at 105.

Appellants now seek to overcome this evidentiary vacuum by making broad and unsupported assertions to this Court, such as: ". . . [I]t would be naive indeed to suggest that sales of certain of these drugs could not be stimulated by advertising them at cut rates. . . ." (Jurisdictional Statement, p. 10); and "Who would doubt that prescription birth control pills are frequently passed around to numerous users so that an advertisement announcing a big discount on one such drug could promote sales substantially." (Jurisdictional Statement, p. 11); and "That price and discount

2. See Exhibit 1 & 2 to plaintiffs' Opening Memorandum of Points & Authorities filed Dec. 13, 1974 (CT 167-77) and Supplemental Affidavit filed Jan. 13, 1975 (CT 399-418) and authorities cited therein.

advertising of prescription drugs can, and undoubtedly will, produce an artificial and unhealthy demand for certain of these drugs is therefore simply a fact of life." (Jurisdictional Statement, p. 11).

The "simple fact of life" is that the record herein provides no substantial evidentiary basis for any of these sweeping assertions. Appellants are, in reality, asking this Court to ignore the record and the lower court's findings and now assume facts which were not proved below. This obviously is not the function of this Court. F.R.Civ.P. 52(a); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948).

In the same vein, Appellants' fears about the use of "loss leader" sales tactics and other hypothetical means of generating this alleged "artificial demand" do not square with the facts of this case, or with reason. There is no way a pharmacist can sell more prescription drugs to a patient, once he is "lured" into the pharmacy, without a new prescription from a doctor. If this were not so, the very price lists posted by pharmacists on their premises pursuant to § 4333 would also create this same "artificial demand."

The central fact and fatal flaw in all of Appellants' arguments about "artificial demand" is that it assumes the availability of physicians who can be pressured into prescribing unneeded medications. Appellants' attempts to support this assumption were found unpersuasive by the court. 395 F.Supp. at 105.

Further, assuming *arguendo* Appellants had adequately supported their assertion that knowledge of prescription drug prices leads to increased pressure upon physicians, and further assuming some physicians could not resist such patient pressure, the appropriate state response is to enforce those provisions such as § 2361.5 which prohibit pre-

scribing unnecessary medications.[3] The answer is *not* to conceal knowledge of drug prices from the public, and thereby foster a non-competitive market in which patients are unaware of the best buy for their required medications.

Appellants' reliance upon the due process cases such as *Semler v. Oregon State Board of Dental Examiners,* 294 U.S. 608 (1935) and *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483 (1955) is inapposite. In the present case we are concerned with First Amendment rights of patient-consumers and the limits of state regulation of these rights. As noted in *Bigelow, supra,* at footnote 10, these due process cases are in no way inconsistent with the present First Amendment analysis. To affirm the lower court's decision in no way requires the overruling of these cases, as suggested by Appellants.

Appellants' concern over the prevalent use and abuse of drugs in today's world is well taken. However, to suggest that drug abuse has been fostered by price advertising is wrong. At present, 23 states[4] permit the advertising of prescription drug prices. Appellants have produced no evidence whatever of increased drug use through over-prescribing in these states. None of the other evils envisioned

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3. Under basic constitutional principles, the state is obligated to pursue its objectives in a manner least offensive to citizens' constitutional rights. Dunn v. Blumstein, 405 U.S. 330 (1972); Shelton v. Tucker, 364 U.S. 479 (1960). As stated by the lower court:

> "Each asserted state interest can be more directly protected without restricting access to information on prescription drug prices." 395 F.Supp. at 106.

The fostering of a non-competitive market by the statutory scheme with its resultant higher prices to patients, is an extraordinarily indirect approach to possible over-prescribing by physicians.

4. Note, "Retail Drug Advertising Bans Are Bad Medicine For Consumers—Is There a Sherman Act Prescription?" 15 Ariz.L.Rev. 117 (1973).

by Appellants have been shown to occur in these states. The problems voiced by Appellants are simply not the result of the public's awareness of the price of prescription drugs. Viewed in light of the paramount importance of Appellees' First Amendment rights, these general problems of drug abuse in no way support the infringement upon free speech and press sought herein by Appellants.

CONCLUSION

Wherefore, Appellees respectfully submit that the questions upon which this appeal was taken are so unsubstantial that further argument is not warranted. Appellees therefore respectfully move the Court to affirm the judgment entered in this cause by the District Court for the Northern District of California.

DATED: September 23, 1975.

San Francisco, California

Respectfully submitted,

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